

PUBLIC CONTRACTS APPEALS BOARD

Case No. 175

CT/2706/2007 - Advert. No. 41/2009 - KMS/TEN/036/2008 - Tender for Mechanical and Electrical Installation at Regional Sports Complex, Kirkop

This call for tenders with an estimated value of €529,290 was published in the Government Gazette on 06.02.2009. The closing date for this call for offers was 26.03.2009.

Eight (8) different tenderers submitted their offers.

On 11.11.2009 Messrs Megaline (M&E) Ltd filed an objection against the decision by the Contracts Department to cancel the call for tenders since none of the tenders were found fully compliant with the tender specifications and conditions.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on 09.12.2009 to discuss this objection.

Present for the hearing were:

Megaline (M&E) Ltd

Dr Arthur Azzopardi	Legal Representative
Mr Emanuel Abela	Representative
Engineer J Vassallo	Representative
Mr George Xuereb	Representative

Kunsill Malti għall-iSport (KMS)

Dr Peter Fenech	Legal Representative
Mr Bernard Vassallo	Chairman
Mr Joe Cassar	CEO (KMS) and Secretary

Consultants

Mr Ronnie Vella	Engineer
Mr Nicholas Bellizzi	Engineer

Contracts Department

Mr Anthony Cachia	Director (Operations)
Mr Mario Borg	Asst. Director (Pre Contracts)

After the Chairman's brief introduction, Megaline Ltd's representative was invited to explain the motives of the objection.

At this point, Dr Peter Fenech, legal representative of *Kunsill Malti għall-Isport*, the contracting authority, requested the PCAB to allow him to make an introductory submission to explain the following events which were aimed at make clarifying matters:

- a. The appellant Company had been disqualified for having failed to submit the document referred to in clause 1.20.7 – *Information required with quotation* – of the tender document. However, on the insistence of the bidder, the consultant engineer, namely Mr Ronnie Vella, went through the documentation once again and found this document, which apparently had not been placed where it should have been placed. When asked by the PCAB to do so Dr Fenech confirmed that the document in question was submitted with the original documentation
- b. On being informed that the 'missing' document, which was the reason for exclusion, had been found, the Contracts Department instructed the contracting authority to proceed with the evaluation of the tender. Subsequently, the evaluating board found another document, the brochure relative to an electric meter, missing and on referring the matter to the Contracts Department the latter instructed that the tender should not be considered further.

Mr Ronnie Vella, consultant engineer to the contracting authority, informed the PCAB and those present that eight tenderers participated of whom, five did not submit the schedule, two had certain technical literature missing and the appellant Company, who submitted all the documentation except for the brochure of an electric meter, which was valued at about € 800. When asked by the PCAB what the value of the entire tender was these were informed that the value was € 500,000.

When asked to state whether, in his opinion, the said missing brochure was so pivotal when taken within a context of the entire tender, Mr Vella said that he considered this brochure of no or negligible importance for the adjudication process.

Dr Arthur Azzopardi, legal adviser of the appellant Company, argued that once the missing document had been found and given that the other missing information was being considered of minor or of no importance to the adjudication of the tender, then his client's offer ought to be submitted for further evaluation.

Dr Fenech remarked that, judging from his experience in similar other cases, the general guidelines given to adjudicating boards were to adhere strictly to the tender conditions and specifications.

The Chairman PCAB remarked that adjudicating boards were expected to seek directions from the Contracts Department with regard to significant deviations from the tender

specifications and conditions. However the PCAB also expected that an adjudicating board should shoulder its responsibilities and decide on matters that were within its realm of possibilities, as the one under consideration which concerned a brochure of insignificant importance to the process. He argued that such behaviour was stifling the tendering process and, worse still, it was often leading to the cancellation of tenders and, very often, a negotiated procedure being resorted to.

At this point the Chairman PCAB noted that the date of tender publication was the 6th February 2009, and in December, i.e. some 10 months later, the tender had not been adjudicated but was being cancelled which was not fair on tenderers considering the time, money and effort put in drawing up their submissions.

Mr Bernard Vassallo, Chairman of the Evaluating Committee, intervened to declare that in the past weeks he did try to propose practical ways how to proceed with the adjudication of this tender however his proposal was rejected by the DG Contracts.

Mr George Xuereb, also representing the appellant Company, drew the attention of the PCAB that by letter dated 2nd September 2009 the Department of Contracts had informed them, among other things, ... *that the Evaluation Committee has recommended that since none of the offers were fully compliant with the tender's specifications and conditions, this tender is to be cancelled.*

Mr Mario Borg, Assistant Director (Contracts Department), under oath, remarked that he was not aware of the details of the tender in question but on being questioned by the PCAB why the Contracts Department directed that the appellant Company's offer should be disqualified for the non-submission of the brochure pertaining to an electrical meter, valued at about €800 and which the consultant engineer considered as having no bearing on the adjudication process, Mr Borg replied by putting another question, namely "Why did the contracting authority, which was responsible for drawing up the tender specifications, request that information in the first place, when it was now considering it as unimportant?"

The Chairman PCAB agreed with what Mr Borg had just remarked but he was quick to add that there were instances when tenderers were being excluded on minor shortcomings and when the documentation they submitted was substantially compliant and clearly indicative that they were *bona fide* bidders.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 16.11.2009 and also through their verbal submissions presented during the public hearing held on the 09.12.2009, had objected to the decision taken by the General Contracts Committee;

- having taken note of Dr Fenech's verbal submission wherein he confirmed that the document in question was actually submitted with the original documentation and not as, erroneously, initially thought so by the evaluators officially appointed;
- having also taken note of the fact that albeit, upon further evaluation, it transpired that the tender document as submitted by the appellant Company did not contain a brochure referring to an electric meter the value of which was € 800, this oversight was later regarded by the same technical consultant as of negligible importance;
- having heard that despite being fully aware of both the evaluating board's consultant's and the contracting authority's different viewpoint, the Contracts Department still gave instructions to the contracting authority for the latter to desist from considering further the tenderer's offer;
- having also re-assessed its own remarks in regard made during the same hearing that, whilst it acknowledged that adjudicating boards were expected to seek directions from the Contracts Department with regard to significant deviations from the tender specifications and conditions, yet the PCAB also expected that an adjudicating board should shoulder its responsibilities and decide on matters that are within its realm of possibilities, as the one under consideration which concerned a brochure of insignificant importance to the entire adjudication process;
- having taken full cognizance of Mr Vassallo's statement regarding the attempts made to no avail to propose to the Department of Contracts practical ways how to proceed with the adjudication of this tender;
- having reflected on Mr Borg's testimony and apposite remarks;

reached the following conclusions, namely:

1. The PCAB feels that the DG Contracts should have been more practical and should have assessed the importance of a mere brochure relating to a piece of equipment whose worth was valued at €800 within the relative context of the entire tender value which was budgeted at €529,290.
2. The PCAB, whilst agreeing with the Contracts Department's representative on certain mandatory requirements which are '*sui generis*' of negligible importance, yet maintains that instances when tenderers are being excluded on minor shortcomings are becoming increasingly frequent with resultant undue delays to the entire adjudication process and total disregard to the fact that certain documentation, as submitted by certain rejected bidders, would have been substantially compliant and clearly indicative that bidders in question would have acted in *bona fide*.

3. The PCAB expects that an adjudicating board should shoulder its responsibilities and decide on matters that are within its realm of possibilities and for which its members would have been appointed in the first place.

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company and that their offer should be re-considered.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel Esposito
Member

16 December 2009